UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

BUREAU OF NATIONAL AFFAIRS

Employer

and Case 5-UC-375

WASHINGTON-BALTIMORE NEWSPAPER GUILD,
LOCAL 32035, TNG-CWA, AFL-CIO, CLC

Union-Petitioner

DECISION AND ORDER DISMISSING PETITION

On January 16, 2001, the Washington-Baltimore Newspaper Guild, Local 32035, TNG-CWA, AFL-CIO, CLC, (herein Petitioner, Union or Guild) filed the instant unit clarification petition under Section 102.61(e) of the National Labor Relations Board's Rules and Regulations, Series 8, as amended, and Section 101.17 of the Board's Statements of Procedures. The Union seeks to include "employees who telecommute from, and/or are home workers outside the Washington, D.C. vicinity."

Pursuant to the provisions of Section 3(b) of the Act, the Board has delegated its authority in this proceeding to me. Based on my investigation and the following facts, I dismiss the Union's petition for the reasons set forth below.

I. PROCEDURAL BACKGROUND[1]

The Washington-Baltimore Newspaper Guild has been the long-standing certified bargaining representative of most of the non-supervisory employees of the Bureau of National Affairs (BNA). The most recent collective-bargaining agreement between BNA and the Guild is effective June 27, 2000 to February 28, 2003. The recognition clause of that contract provides:

> The Publisher recognizes the Guild as the representative of all employees in the editorial, accounting, business, production, information technology, circulation and sales departments, and the personnel office of the Publisher at Washington, D.C., and vicinity, including all part-time employees, but excluding all temporary employees, all "call-in" employees, all outside salesmen, all

[1] For purposes of this Decision and Order Dismissing Petition, the facts set forth in Petitioner's March 19, May 23, and July 16, 2001 correspondence with the Region are assumed to be true.

> confidential employees who have access to the Publisher's labor relations data, managing editors and assistant managing editors, and all other supervisory personnel with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

The Guild represents telecommuters who reside in the Washington, D.C. area. That is, telecommuters who live and work in the Washington, D.C. vicinity are covered by the contract.

In July 2000, BNA posted an Index Editor /G-8 job vacancy announcement. The Guild bargaining unit includes a number of positions in the same classification in BNA's Washington, D.C. area facilities.

On September 11, 2000, BNA hired Louise Seiler for the posted position. Seiler performs her work by telecommuting via phone lines from her home near Cleveland, Ohio. She reports to the same index services manager (located in Washington, D.C.) to whom other index editors report. She performs her work with software provided by BNA. Her wages, benefits, and job duties are the same as other G-8 index editors represented by the Guild. When the Guild attempted to schedule Seiler for an orientation session, BNA took the position that Seiler was not in the unit covered by the contract because she lives and works in Ohio, i.e., outside the geographic reach of the contract.

The instant unit clarification petition was filed on January 16, 2001. Petitioner proposes to clarify the contractual recognition clause to include the underscored language:

> The Publisher recognizes the Guild as the representative of all employees in the editorial, accounting, business, production, information technology, circulation and sales departments, and the personnel office of the Publisher at Washington, D.C., and vicinity, including all part-time employees, <u>and employees who telecommute from, and/or are home workers outside the Washington, D.C. vicinity</u>; but excluding all temporary employees, all "call-in" employees, all outside salesmen, all confidential employees who have access to the Publisher's labor relations data, managing editors and assistant managing editors, and all other supervisory personnel with authority to hire, promote, discharge, discipline, or otherwise effect changes in the status of employees, or effectively recommend such action.

The administrative investigation establishes that BNA reporters, journalists and editors, who lived and worked in the Washington, D.C. vicinity, have been covered by the contract. On the other hand, "correspondents," who are reporters and journalists who do not live and work in the Washington, D.C. vicinity, have been excluded from the contract. For example, in March 1979, unit Environmental Reporter, Nancy Netherton,

relocated from BNA's Washington, D.C. office to Seattle, Washington where she initially became a "call-in" employee, and thus expressly excluded by contract.[2] On January 16, 1979, Ms. Netherton changed status from "call-in" to full time. Thereafter, on January 5, 1980, Ms. Netherton requested two days of personnel leave under the contract. BNA denied her request stating, inter alia: "Our contract with the WBNG does not cover employees outside of the Washington, DC area." The investigation establishes that Ms. Netherton was denied contractual benefits, despite her change to full time status, because she performed her work in Seattle, Washington, a locale well outside the geographic limitations of the contractual recognition clause.

Similarly, in January 1981, unit Mine Safety and Health reporter, Larry Evans, relocated from BNA's Washington, D.C. office to Los Angeles, California. Following his relocation to Los Angeles, Mr. Evans became a part-time BNA staff correspondent working 20 hours per week. The Chief of Correspondents, located in Washington, D.C., supervised Evans. The applicable 1980-1982 collective-bargaining agreement covers part-time employees who work 20 hours per week. The applicable Personnel Action Request form, however, indicates that Larry Evans transferred out of the Guild unit as a result of the location change. In sum, the administrative investigation establishes that Evans was excluded from the contractual unit because of his relocation outside the Washington, D.C. vicinity to Los Angeles, California.[3]

About April 1990, Lance Rogers and Joan Rogers, relocated from Silver Spring, Maryland to Charlottesville, Virginia. On April 2, 1990, Joan Rogers became a "call-in" Legal Editor, excluded from the contract. On April 2, 1990, Lance Rogers became a part-time Legal Editor eligible for contractual coverage. From April 1990 until late fall 1995, Lance and Joan Rogers commuted from Charlottesville, Virginia to Washington, D.C. when they were scheduled to work. Lance Rogers continued to report to Washington, D.C. two days a week.

On or about October 13, 1995, Lance and Joan Rogers approached BNA and worked out a new informal telecommuting arrangement. Under this arrangement, BNA allowed Lance and Joan Rogers to perform the majority of their work from their home in Charlottesville, Virginia, although both were required to occasionally report to Washington, D.C., as needed, to fill in for absent managers or to attend certain meetings or training. BNA reserved the right to terminate the telecommuting arrangement with one month's notice. On January 1, 1996, Joan Rogers went from call-in status back to part-time status.

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[2] The applicable collective-bargaining agreement defines "call-in employees" as "those that work an irregular schedule averaging less than half the regular workweek of 37.5 hours." This definition has nothing to do with location of work.

[3] In 1982, the Guild organized "correspondents" in a separate unit. This unit excluded other employees, who, although telecommuting from outside the Washington, D.C. area, are not "correspondents."

During the investigation, Petitioner provided a copy of a confidential document from BNA entitled "WBNG Semi-Annual Address Listing." An entry for Lance and Joan Rogers appears on the document. Based on this document, Petitioner claims that Lance and Joan Rogers are in the bargaining unit. BNA contends that the Rogers' names and address appear on the document by error. BNA further contends that the issue of unit or contract coverage is flagged only when an employee, such as Nancy Netherton, invokes some right under the contract that is not otherwise available to non-unit employees. BNA claims that the issue of the Rogers' eligibility for contractual benefits has not arisen since commencement of their telecommuting arrangement, and therefore, BNA has not addressed the issue.

II. POSITIONS OF THE PARTIES

A. The Guild's Position

The Guild argues that there is no legitimate legal distinction between employees, who telecommute or perform bargaining-unit work from their home in the Washington, D.C. vicinity, and Louise Seiler, who works from her home in the Cleveland, Ohio area. The Guild further contends that there is no mutually recognized practice of excluding from the unit employees who perform unit work by telecommuting from outside the Washington, D.C. area. Finally, the Guild contends that no other telecommuter who performs unit work, besides Seiler, is excluded from the unit because of telecommuter status.

B. BNA's Position

BNA asserts that telecommuters who live and work outside the Washington, D.C. vicinity do not fall within the geographic scope of the contractual recognition clause and have been excluded historically from the unit. BNA asserts that Seiler's situation is no different. BNA contends that Seiler is excluded from the unit because she lives and works in Ohio, not because she telecommutes. Accordingly, because there has been no change in circumstances following the last contract that would make a unit clarification petition appropriate at this time, BNA argues that the instant petition should be dismissed. Caesar's Palace, 209 NLRB 950 (1974); Robert Wood Johnson University Hospital, 328 NLRB 912 (1999).

III. ANALYSIS

For the reasons set forth below, I find that the instant unit clarification petition concerns a position that has been historically excluded from the unit and that has not been shown to have undergone recent substantial changes. I find that no hearing is necessary because application of well-settled Board law to certain undisputed facts warrants dismissal of the petition under historical exclusion principles. Accordingly, I dismiss the petition.

The Board's express authority under Section 9(c)(1) to issue certifications includes the implied authority to police such certifications and to clarify them as a means of effectuating the policies of the Act. Thus, Section 102.60(b) of the Board's Rules and Regulations, Series 8, provides that a party may file a petition for clarification of a bargaining unit where there is a certified or currently recognized bargaining representative and no question concerning representation exists.

The Board described the purpose of unit clarification proceedings in Union Electric Co., 217 NLRB 666, 667 (1975):

> Unit clarification, as the term itself implies, is appropriate for resolving ambiguities concerning the unit placement of individuals who, for example, come within a newly established classification of disputed unit placement or, within an existing classification which has undergone recent, substantial changes in the duties and responsibilities of the employees in it so as to create a real doubt as to whether the individuals in such classification continue to fall within the category—excluded or included—that they occupied in the past. *Clarification is not appropriate, however, for upsetting an agreement of a union and employer or an established practice of such parties concerning the unit placement of various individuals, even if the agreement was entered into by one of the parties for what it claims to be mistaken reasons or the practice has become established by acquiescence and not express consent.*

(emphasis added). As stated in Robert Wood Johnson University Hospital, 328 NLRB 912, 914 (1999), quoting United Parcel Service, 303 NLRB 326, 327 (1991), enfd. Teamsters National UPS Negotiating Committee v. NLRB, 17 F.3d 1518 (D.C. Cir. 1994):

> The limitations on accretion discussed above and applied in *Laconia Shoe* require neither that the union have acquiesced in the historical exclusion of a group of employees from an existing unit, nor that the excluded group have some common job-related characteristic distinct from unit employees. *It is the fact of historical exclusion that is determinative.*

(emphasis in original). Accord: ATS Acquisition Corp., 321 NLRB 712 (1996); Sunar Hauserman, 273 NLRB 1176 (1984); Plough, Inc., 203 NLRB 818 (1973). A petition seeking to include a classification that historically has been excluded raises a question of representation, which can only be resolved through an election, or based on majority status. Boston Cutting Die Co., 258 NLRB 771 (1981).

Applying these principles to the circumstances of this case, I find that Louise Seiler does not fall within any newly established classification of disputed unit placement or within any existing classification which has undergone recent, substantial changes in duties and responsibilities. Rather, the administrative investigation establishes that telecommuting employees, such as Louise Seiler, who perform unit work but who live and work outside the Washington, D.C. vicinity, have been excluded historically from the

recognized bargaining unit. The investigation establishes that BNA historically has employed non-unit telecommuters, who physically live and work outside the Washington, D.C. vicinity, to perform duties that otherwise would be performed by unit employees at headquarters. For example, BNA reporters Nancy Netherton and Larry Evans, who were covered by the contract when they lived and worked in the Washington D.C. area, were excluded from the unit once they relocated outside the Washington, D.C. vicinity. This was so even though Ms. Netherton and Mr. Evans continued to perform what would otherwise be considered unit work.

BNA's treatment of Lance and Joan Rogers is not inconsistent with its historical exclusion of telecommuters, who live and work outside the Washington, D.C. vicinity. As noted, the Rogers' relocated from the Washington, D.C. vicinity to Charlottesville, Virginia in 1990, prior to commencement of their telecommuting arrangement in late 1995. In April 1990, Joan Rogers became a contract employee excluded from unit coverage. From April 1990 until late 1995, Lance Rogers continued to commute to Washington, D.C. when scheduled to work on a part-time basis. The issue of the Rogers' unit status has not arisen since the institution of their informal telecommuting arrangement in late 1995.

In these circumstances, I find that telecommuting employees such as Ms. Seiler, who clearly live and work outside the Washington, D.C. vicinity, have been excluded historically from the unit since at least 1979, and that unit clarification would upset an established practice of excluding these positions from the unit. I further find that the telecommuters at issue have not undergone recent, substantial changes appropriate for resolution in a unit clarification proceeding. See Bethlehem Steel Corp., 329 NLRB 243, 244 (1990).[4] Accordingly, as no recognized exception to the doctrine of historical exclusion is applicable, I dismiss the petition.[5]

ORDER

IT IS HEREBY ORDERED that the petition filed herein be, and it hereby is dismissed.

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[4] In Bethlehem Steel, the Board documented certain exceptions to the principle of historical exclusion. These exceptions apply when 1) unit clarification is sought to exclude a position that historically has been included contrary to statutory requirements, or 2) to prevent enforcement of an arbitration award that effectively accretes a position to a unit in contravention of established Board policy. 329 NLRB at 244, fn. 5. These exceptions to the principle of historical exclusion have no application to this case.

[5] I note that the Petitioner may seek to represent telecommuters (apart from those already represented), who live and work outside the Washington, D.C. vicinity, through a representation petition or self-determination election, much like in 1982 when the Guild organized the correspondents in a separate unit and negotiated the first correspondents' contract with BNA.

RIGHT TO REQUEST REVIEW

Under the provisions of Section 102.67 of the Board's Rules and Regulations, a request for review of this Decision may be filed with the National Labor Relations Board, addressed to the Executive Secretary, 1099 14th Street, NW, Washington, DC 20570. This request must be received by the Board in Washington by FEBRUARY 13, 2002.

Dated: January 30, 2002
At Baltimore, Maryland

/s/ WAYNE R. GOLD
Regional Director, Region 5

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